PT 04-38
Tax Type: Property Tax
Issue: Charitable Ownership/Use

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

BERGHOFF CAFÉ APPLICANT	**No:**	**03-PT-0015 (01-16-3015)**
v.	**P.I.N.S:**	**12-08-100-006-8561**
DEPARTMENT OF REVENUE STATE OF ILLINOIS		

RECOMMENDATION FOR DISPOSITION

APPEARANCE: Mr. Patrick J. Cullerton of Fagel & Harber on behalf of the Berghoff Café (the "applicant"); Mr. George W. Foster, Special Assistant Attorney General, on behalf of the Illinois Department Of Revenue (the "Department").

SYNOPSIS: This matter raises the issue of whether a leasehold identified by Cook County Parcel Index Number 12-08-100-006-8561 (the "subject leasehold") should be subject to a leasehold assessment for 2001 real estate taxes under 35 **ILCS** 200/15-195. The underlying controversy arises as follows:

Applicant filed a Real Estate Tax Exemption Complaint, which sought to exempt its interest in the subject leasehold from the leasehold assessment provisions contained in 35 **ILCS** 200/15-195, with the Cook County Board of Review (the "Board") on May 29, 2002. Dept. Group Ex. No. 1. The Board reviewed this Complaint but recommended that "no action" be taken thereon. *Id*. After reviewing the Board's recommendation, the Department issued its initial determination in this matter on December 12, 2002, which

denied the requested exemption on grounds that the subject leasehold was not in exempt ownership and not in exempt use. *Id*.

The applicant filed a timely appeal to the Department's initial determination and later presented evidence at a formal evidentiary hearing, at which the Department also appeared. Following a careful review of the record made at hearing, I recommend that the Department's initial determination in this matter be affirmed.

FINDINGS OF FACT:

1. The Department's jurisdiction over this matter and its position herein are established by the admission of Dept. Group. Ex. No. 1.
2. The Department's position in this matter is that applicant's interest in the subject leasehold is subject to a leasehold assessment under Section 9-195 of the Property Tax Code because it is not in exempt ownership and not in exempt use. *Id*.
3. The subject leasehold is identified by Cook County Parcel Index Number 12-08-100-006-8561 and is one of the food concessions located in concourse C of terminal one at O'Hare Airport. (the "airport"). *Id*.
4. The airport is owned and operated by the City of Chicago (the "City"), which is a municipal corporation and home rule unit of local government established pursuant to Article VII of the Constitution of the Statue of Illinois. Administrative Notice; Applicant Ex. No. 1.[1]
5. Applicant is a for-profit, limited liability corporation organized under the laws of the State of Delaware having its principal place of business at a commercial restaurant located in Chicago, Illinois. Applicant Ex. No. 1.

6. Applicant and the City entered into a "license agreement" (the "agreement") on February 2, 1997. Applicant Ex. No. 1.

7. This agreement, which names the City as "licensor" and the applicant as "licensee," specifically states, in relevant part, that its terms and conditions create "a license only and Licensee acknowledges that Licensee does not and shall not claim at any time any real property interest or estate of any kind or extent whatsoever in the [subject leasehold] by virtue of this license or the Licensee's use of the [subject leasehold] pursuant hereto." *Id*.

8. The agreement provides, in substance, that, in exchange for certain financial[2] and other considerations, the City grants to the applicant a "license" to operate a food and beverage concession at a certain specifically identified location within concourse C of terminal one of the airport. *Id*.

9. The agreement states, in relevant part, that, with certain minor exceptions that do not affect the outcome herein:

> "… the Licensee agrees that the principal purpose of this Agreement is to provide for a license to the Licensee to provide, without right of sublicense or assignment, the [specific] Concession Operations [detailed in the Agreement]. Any sublicense or assignment requires approval of the City as set forth in this Agreement. Any and all agreements between Licensee and any Sublicensee are subject to the review and approval of the [City's] Commissioner [of Aviation]; provided, however, that the Commissioner is not obligated to review or approve such agreements.

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1. The City's fee interest in the real estate that contains the subject leasehold is exempt under Section 15-60 of the Property Tax Code (35 **ILCS** 200/15-60) and is not at issue herein. Administrative Notice.

2. These financial considerations are detailed in Findings of Fact 15, 16, 17 and 18, *infra* at pp. 8-9.

Id.

10. The agreement runs for a term of ten years, commencing on February 2, 1997 and expiring "at 11:59 p.m. of the tenth anniversary of nineteenth day" after the City makes the subject leasehold available to the applicant for purposes of constructing its food and beverage facility thereon. *Id*.

11. The term may be extended no more than twice, with each extension lasting for a period of no more than one year. *Id*.

12. The agreement states, *inter alia*, that the applicant may only serve certain specifically-defined food items at the subject leasehold, and further, states that the prices it may charge for those food items shall not exceed the prices that it charges for those same food items at its restaurant. *Id*.

13. The agreement also contains the following relevant terms and conditions that govern the applicant's use of the subject leasehold:

    A. the applicant shall not use the subject leasehold for any purposes, or in any manner, other than those specified in the agreement;

    B. the applicant shall not conduct its food concession operations at the subject leasehold in any manner that interferes with others' use of the common concourse areas or creates any type of a hazard in the airport. The applicant shall, nevertheless, be afforded appropriate and necessary ingress and egress to the subject leasehold, provided that it is otherwise in compliance with its obligations under the agreement;

    C. the applicant must operate its food concession in a manner that reflects favorably upon the City and the airport, and in doing so, must adhere to

certain standards set forth in the City's "Airport Concessions Program Handbook"[3] that is attached to the agreement;

D. the applicant must also take all commercially reasonable steps to maximize the volume of business it transacts at the subject leasehold. Specifically, the applicant must provide quality services to the public which consist of, but are not necessarily limited to, ensuring that its employees: (1) act in a courteous, businesslike and professional manner at all times; (2) welcome all travelers and provide directions to all who ask; (3) wear clean and neat uniforms; (4) wear appropriate identification, including required security badges; (5) make change for the public regardless of whether a purchase is made; and, (6) accept as suitable payment for all sales of merchandise having an aggregate value of $10.00 or more any of at least three nationally recognized credit cards, including without limitation, American Express, Visa, MasterCard and Discover;

E. the applicant must continuously remain open daily one hour prior to the first flight scheduled to depart from the concourse in which the subject leasehold is located through one hour after the last flight is scheduled to depart or arrive from that concourse;

3. This Handbook consists of various rules, regulations, policy directives, forms, etc. that the City promulgates for the governance of all matters pertaining to the conduct of businesses that operate airport concessions. Such matters include, *inter alia*, standards for employee conduct, product quality reviews, financial audits and other quality controls which the City enforces through various rights of inspection. For a detailed recitation of the contents of this Handbook, *see*, Applicant Ex. No. 1.

F. the applicant must also remain open during such emergency hours as the City's Commissioner of Aviation (the "Commissioner") may deem necessary or appropriate to sustain the airport's operations;

G. the Commissioner may, however, grant the applicant written permission to temporarily close its concession operation during hours when it would otherwise be required to be open for business;

H. the applicant may, at its own expense, install and operate necessary and appropriate identification signs on the exterior areas of the subject leasehold, provided that such signs conform to the size, height, location, design and other criteria established by the Commissioner. The applicant may not, however, install and operate signs outside of the subject leasehold without first obtaining express written consent from the Commissioner;

I. the applicant shall also have the right to install and display within the subject leasehold such "temporary promotional signs and advertising materials as are generally used by the [applicant] in connection with the operation and identity of its business," provided that such signs and advertising are consistent with all applicable governmental rules and regulations, and also meet whatever requirements the City may impose;

J. the applicant shall perform the levels and types of advertising, public relations and marketing that it sets forth in an annual marketing plan, which it must submit for the Commissioner's written approval no later

than September 30 of the year before the year in which the plan is to take effect;

K. the applicant shall be responsible for providing all necessary cleaning and janitorial services to the subject leasehold, and also, shall perform any cleaning, maintenance, repair and or replacement work that is necessary to ensure that its food concession operation remains "in first class condition and repair" throughout the term of the agreement;

L. the applicant shall also conduct periodic consumer surveys, study industry trends and provide the Commissioner with written reports that summarize the results of these studies and surveys;

M. the applicant shall participate in the merchant's association, which is organized to market all of the concession operations at the airport;

Id.

14. The agreement further states that the City reserves the right to monitor the applicant's compliance with all performance-related terms of the agreement by sending unidentified representatives to purchase items from the food concession that the applicant operates at the subject leasehold. If the City finds that the applicant is not in compliance, it shall notify the applicant, which shall then either cure its non-compliance or provide the Commissioner with a written schedule for implementing measures that will result in compliance. If the applicant fails to implement such measures, then it shall be subject to fines set in amounts that are set forth in the agreement until such time that it effectuates compliance. *Id.*

15. The agreement further states, that in consideration for the "license" to operate its food concession enterprise at the airport, the applicant shall pay to the City "fees" in an amount equal to the greater of:

    A. an annual "Percentage Fee," payable in monthly installments, which shall be equal to the greater of: (1) 17% of all the gross revenues from sales of concession merchandise sold at the subject leasehold, if such gross revenues are between $0.00 and $2,750,000.00; or, (2) 16% of all the gross revenues from sales of concession merchandise sold at the subject leasehold, if such gross revenues exceed $2,750,000.01; or,

    B. a "Minimum Guarantee Fee," which shall be: (1) $300,000.00 for the first year in which the applicant commences its food concession operations at the subject leasehold, and, (2) for each subsequent year, the greater of either: (a) $300,000.00; or, 80% of the "Percentage Fee" payable for the year prior to the one for which such fee is due.

Id.

16. Under terms of the agreement, the applicant must pay 1/12 of the "Minimum Guarantee Fee" on or before the first day of each calendar month throughout the term of the agreement. It must also pay the amount, if any, by which the actual "Percentage Fee" for the preceding month exceeds the "Minimum Guarantee Fee" no later than the fifteenth day of each calendar month throughout the term of the agreement. *Id*.

17. In addition to paying the "fees" referenced above, the agreement also obligates the applicant to pay:

    A. all real estate taxes, assessments and other charges levied against the subject leasehold; and,

    B. all costs for utilities, including natural gas, water, sewage and electricity, provided to the subject leasehold.

Id.

18. The agreement contains the following provisions relative to the applicant's possession of the subject leasehold:

    A. the Commissioner shall not withdraw the subject leasehold from the terms and conditions of the agreement unless such withdrawal should become necessary to either: (1) meet the operational needs of the airport; or, (2) accommodate any changes that the Federal Aviation Administration or airline requirements mandate to the design or non-retail use of, all or any portion of the domestic terminals located at the airport;

    B. if, in the Commissioner's judgment, such withdrawal should become necessary at any time during the term of the agreement, the Commissioner shall make a good faith effort to relocate the applicant's food concession operation to a comparable location that is reasonably acceptable to the applicant, (1) "in proximity" to its former location; (2) with approximately the same square footage as that former location; and, (3) exposed to approximately the same amount of traffic from passengers, domestic terminal visitors and airport personnel as its former location;

C. if the Commissioner elects to withdraw the subject leasehold from the terms and conditions of the agreement during the final five years that the agreement is in effect, then the applicant may, upon appropriate written notice to the Commissioner, elect to terminate the agreement as to the subject leasehold, in which event the agreement with respect to such leasehold shall be terminated effective on the thirtieth day following the date of the applicant's election to terminate;

D. if the applicant elects to effectuate such a termination, or if the agreement expires at the end of its ten-year term and/or any extensions thereto, the applicant shall, "promptly, peaceably and in good order quit, deliver up and return" possession of the subject leasehold to the City, with such leasehold being in as good condition and repair as it was when the applicant assumed occupancy. The applicant shall also remove any improvements it may have installed on the subject leasehold, together with any signs, advertising or displays that it caused to be installed thereon when the term ends.

Id.

19. The agreement specifies, in relevant part, that the following events shall constitute events of default:[4]

4. For a complete listing of events of default, *see* Applicant Ex. No. 1.

A. the applicant makes any material misrepresentation to the City in connection with the agreement;

B. the applicant fails to make timely and full payment of any and all financial obligations, which include but are not limited to, "fee" payments and taxes, that it incurs under the agreement;

C. the applicant fails to promptly keep, comply with or perform any of the covenants, terms and conditions set forth in the agreement;

D. the applicant fails to abide by any obligation, duty or restriction that the agreement imposes on the applicant, including, but not limited to, the applicant's obligation to abide by all of the pricing policies that the agreement contains; and,

E. the applicant fails to cure any such breach of duty or other obligation in a timely manner.

Id.

20. The agreement specifies, in relevant part, that the City shall have the following rights in the event that the applicant commits one or more events of default without cure:[5]

A. the City may terminate the agreement, exclude the applicant from the subject leasehold and recover appropriate monetary damages for the breach;

B. the City, acting through the Commissioner, may reenter and repossess the subject leasehold in accordance with applicable law, and also, may, but need not, "relicense" all or part of the subject leasehold;

5. For a complete listing of the City's remedies, *see* Applicant Ex. No. 1.

C. in the event that the Commissioner elects to effectuate such a reentry and repossession, the Commissioner may, at the Commissioner's sole option, serve notice upon the applicant that the agreement "shall cease and expire and become absolutely void on the date specified in such notice, provided that this date occurs no less than five days after the date of the notice, "without any right on the part of the [applicant] thereafter to save the forfeiture by payment of any sum due or by the performance of any term, provision, covenant, agreement or condition broken;"

D. the City may also "exercise the remedy of self-help and to enter upon the [subject leasehold] and remove therefrom all inventory, equipment, machinery, trade fixtures and personal property of whatsoever kind or nature, whether owned by the [applicant] or by others and to store said items at the [applicant's] cost for thirty (30) days[;]"

E. the City shall have the right to seek and obtain specific performance, a temporary restraining order or any injunction, or any other appropriate equitable remedy; and,

F. the City shall have the right to seek and obtain money damages, including without limitation special, exemplary, incidental and consequential damages proximately caused by or resulting from a qualifying event of default.

Id.

CONCLUSIONS OF LAW:

Section 9-195 of the Property Tax Code, 35 **ILCS** 200/1-1, et seq. states that:

> Except as provided in Section 15-55 [which governs exemption of property owned by the State of Illinois], when property which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the property taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her assignee. Taxes on that property shall be collected in the same manner as property that is not exempt, and the lessee shall be liable for those taxes.

35 **ILCS** 200/9-195.

The applicant challenges the imposition of a leasehold assessment herein on grounds that its interest in the subject leasehold does not qualify as a "leasehold estate[s]" within the meaning of Section 9-195. Rather, the applicant argues that the written agreement pursuant to which it holds that interest constitutes a non-taxable license to use otherwise exempt property belonging to the airport.

The legal significance of distinguishing between licenses and leaseholds is that the former are not taxable interests, provided that they truly qualify as licenses for the use of exempt property. Jackson Park Yacht Club v. Department of Local Government Affairs, 93 Ill. App. 3d 542, 547 (1st Dist. 1981). The latter are subject to taxation under the Section 9-195 of the Property Tax Code. *Id*.

Whether a contractual agreement is a lease or a license is determined, not from the language used, but from the legal effect of its provisions. *Id*. at 546. Hence, the facts that applicant and the City have affixed the title "license agreement" to their contract, employ clauses reciting that the document creates a "license only," and repeatedly use the word "license" to describe the contract's overall structure, do not compel the conclusion

that said contract creates tax exempt license interests in the subject properties as a matter of law.

That conclusion is derived by examining pertinent legal definitions. First, "an instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land … is a mere license." In re Application of Rosewell, 69 Ill. App.3d 996, 1001 (1st Dist. 1979) ("Rosewell"). Thus, "a license is an authority to do some act on the land of another, without passing an estate in the land, and 'being a mere personal privilege, it can be enjoyed only by the licensee himself, and is therefore not assignable so that an under tenant can claim privileges conceded to a lessee.' *Id.* (citing Taylor's Landlord and Tenant, § 14).

In contrast, a leasehold "consists of the right to the use and possession of the demised premises for the full term of the lease." People *ex rel*. Korzen v. United Airlines, 39 Ill.2d 11 (1968). Accordingly, a lease has been defined as "[w]hatever is sufficient to show that one party shall divest himself of possession and the other party shall come into for a terminate time and for a fixed rental amounts to a lease." Miller v. Gordon, 296 Ill. 346, 350 (1921).

The essential requirements of a lease are: (1) a definite agreement as to the extent and bounds of the leased property; (2) a definite and agreed term; and (3) a definite and agreed price of rental and manner of payment [citations omitted]. People v. Metro Car Rentals, 72 Ill. App. 3d 626, 629 (1st Dist. 1979). No particular words are required to create a lease *Id*. Rather, the existence of a lease depends upon the intention of the parties and this intention must generally be inferred from the circumstances of the

particular case. *Id*. Generally, however, the question of possession will determine the matter. *Id*.

In applying these factors herein, it must be remembered that "one who claims an exemption from a property tax has the burden of proving, by clear and convincing evidence, that his or her property comes within the exemption, and the presumption is against the intent of the State to exempt property from taxation." Stevens v. Rosewell, *supra* at 61-62. Therefore, all debatable legal or factual questions must ultimately be resolved in favor of taxation. *Id*.

The specific debatable question currently at issue is whether the agreement creates a taxable leasehold or a non-taxable license. In order to resolve this question, it is necessary that I make a fair reading of the entire agreement as a whole (Forest Preserve District of DuPage County v. Department of Revenue, 266 Ill. App.3d 264, 270 (2nd Dist. 1994)), with due emphasis on ensuring that each clause and word contained within the agreement be given effect (Thomas Hoist Co. v. Newman Co, 365 Ill. 160, 166 (1936); Hufford v. Balk, 113 Ill.2d 168, 172 (1986); Dowd & Dowd v. Gleason, 181 Ill.2d 460, 479 (1998)). Therefore, contractual constructions that reject words as meaningless or superfluous, or create meaningless terms or surplus verbiage, are to be avoided. *Id.*

A cursory reading of the agreement as a whole could create the impression that the provisions of the agreement that permit the City to relocate the applicant from the subject leasehold would be rendered superfluous unless they were construed as conferring the decisive rights of possession on the purported licensor which, in this case, is the City. However, deeper scrutiny of the relocation provisions reveals that the City can invoke these provisions, if and only if, the operational needs of the airport as a whole

require that the applicant be relocated or in the event that such relocation becomes necessary in order to accommodate required changes to other spaces within the airport facility.

Both of the events that trigger application of the relocation provisions are extraordinary in that they fall well outside the normal course of the day-to-day business operations that the agreement allows the applicant to conduct at the subject leasehold. Thus, business reality dictates that these provisions would actually divest the applicant of the possessory rights that accompany conducting such business operations only if the events necessary to trigger their operation, in fact, took place.

The applicant did not present any evidence affirmatively proving that either of the conditions necessary to trigger operation of the relocation provisions, in fact, occurred during the tax year that is currently in question, 2001. Nor did it present any evidence otherwise proving that it was it was in imminent peril of being relocated during that specific tax year.

The applicant, and no other party, bears the burden of proving all elements of its exemption claim by a standard of clear and convincing evidence.[6] Metropolitan Sanitary District of Greater Chicago v. Rosewell, 133 Ill. App.3d 153 (1st Dist. 1985). Furthermore, each tax year constitutes a separate cause of action for exemption purposes. (People *ex rel*. Tomlin v. Illinois State Bar Ass'n, 89 Ill. App.3d 1005, 1013 (4th Dist. 1980).

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6. The clear and convincing standard is met when the evidence is more than a preponderance but does not quite approach the degree of proof necessary to convict a person of a criminal offense. Bazydlo v. Volant, 264 Ill. App.3d 105, 108 (3rd Dist. 1994). Thus, "clear and convincing evidence is defined as the quantum of proof which leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question." In the Matter of Jones, 285 Ill. App.3d 8, 13 (3rd Dist. 1996); In *re* Israel, 278 Ill. App.3d 24, 35 (2nd Dist. 1996); In *re* the Estate of Weaver, 75 Ill. App.2d 227, 229 (4th Dist. 1966).

The applicant failed to introduce any evidence proving that the normal course of its business operations at the subject leasehold would, in fact, be disrupted by operation of the relocation provisions at any point during the 2001 assessment year. Consequently, the question of whether these provisions actually effectuated the type of divesture that would have provided the City with possession of the subject leasehold during that tax year is unproven on this record.

Even if this were not true, the City's right of relocation is not as absolute as the applicant would have it appear. Rather, this right is conditional because the City cannot exercise it except upon the occurrence of certain specifically defined conditions precedent. Because the applicant failed to prove that either of these conditions precedent actually came into fruition during 2001, the City's right of relocation remained conditional, at best, throughout this tax year.

Since the agreement merely reserves to the City a right of relocation that it may never actually be entitled to exercise at any time throughout the entire term of the agreement, whatever right of relocation that the agreement reserves to the City is not decisive herein because, in the final analysis, it is both speculative and conditional. More importantly, the relocation provisions constitute but one portion of a more complex document that, for the following reasons, vests the applicant with possession and control of the subject leasehold.

First, the provisions that govern the City's default remedies specifically allow the City to reenter and retake possession of the subject leasehold if the applicant defaults. The City would not need these rights if it were in truly in possession of the subject

leasehold, as it is factually impossible for the City to *retake* possession of this or any other leasehold without first effectuating an appropriate transfer of possession.

If this were not the case, then the reentry and retaking provisions would become superfluous because the City would not need contractual authorization to repossess property that is already within its lawful custody. Nor would the City require contractual authorization to effectuate the default remedy of self-help, as that remedy, by its very nature, allows the City to remove property that does not otherwise belong to it. Therefore, the net effect of these provisions is, in practical terms, no different from the provisions commonly found in commercial leases which allow the tenant to remain in possession of the leasehold, and maintain quiet enjoyment thereof, so long as the tenant is not in default.

None of the other provisions contained within the agreement, especially those that govern the manner in which the applicant conducts its food concession operation at the subject leasehold, alter this conclusion. The collective effect of these provisions is to provide the applicant with a prime business opportunity. The applicant bargained for this opportunity, and gave certain specifically identified consideration in exchange for it, as part and parcel of the arm's length business transaction with the City that is memorialized in the agreement. Therefore, from a commercial perspective, it is both parties' best interest for the applicant to employ all appropriate means to maximize its return from that business opportunity.

Such means include, but are not limited to, the provisions of the agreement whereby the City purports to exercise control over the prices that the applicant charges for the food items that the applicant sells at the subject leasehold. This provision states,

in substance, that the applicant shall not charge prices that exceed the prices that it charges for the same food items at *its own* restaurant in downtown Chicago. However, any control that the City exercises under this provision is illusory because the City does not, in fact, control the prices that the applicant charges at its restaurant. Therefore, it is the applicant, and not the City, that actually controls the pricing scheme that the agreement creates.

Another such means consists of the agreement provisions requiring that: (1) the applicant's employees to make change for the public regardless of whether a purchase is made; (2) the applicant accept certain specifically enumerated forms of payment, including specifically named credit cards; (3) the applicant abide by the City's Airport Concessions Handbook; and, (4) the applicant observe certain limitations as to the size, height and location of its exterior advertising,

All of these provisions are designed to ensure that applicant conducts its business in a manner that projects the best possible image to, and augments the convenience of, airport patrons. Projecting such an image enables applicant to fulfill its predominant contractual obligation, which is "to take all commercially reasonable measures …" to maximize the volume of business transacted at the subject leasehold. Applicant Ex. No. 1. This, in turn, enables both the applicant and the City to receive significant pecuniary benefits from the business opportunity that the agreement creates.

The applicant receives such benefits by capitalizing on the increased profits that accompany maximum sales volume. For its part, the City benefits because the amount of financial consideration that it receives under the agreement is directly tied to the financial success of the applicant's food concession enterprise. Although the agreement refers to

this consideration as “fees” rather than rent, the business reality of an arrangement whereby the City, as landlord, receives remuneration that in direct proportion to its tenant’s gross sales is no different from that of the percentage rental agreements found in many commercial leases.

Furthermore, whatever fixed “fees” that the applicant might pay in lieu of percentage rentals are no different from set rental payments which commercial landlords would require their tenants to pay in order to ensure that the landlord will continue to receive a certain return from leasing its property irrespective of prevailing business conditions. As such, these fixed “fees” have more to with protecting the City’s pecuniary interest in the rental payments that the applicant makes under the agreement than they do with the legal status of that agreement.

Based on the foregoing, I must conclude that the agreement, read as a whole, creates a leasehold interest for the operation of applicant’s retail food concessions. However, any residual uncertainties as to the taxable status of these leaseholds are completely eradicated by that provision of the agreement wherein applicant specifically agrees to pay all taxes and assessments levied against the subject leasehold.

The applicant negotiated this provision of the agreement, and agreed to be bound the terms thereof, as part of an arm’s length business transaction with the City. It further accepted the consequences of these provisions in exchange for the pecuniary benefits associated with conducting its retail operations at the subject properties. Consequently, applicant would be unjustly enriched if it were permitted to reap these benefits without incurring the detriment of liability for taxation that is part and parcel of its agreement with the City.

This is especially true where, as here, applicant agreed to incur such liability without obtaining a right of reimbursement from the City. The absence of such a right is what distinguishes this case from In Re Application of Rosewell v. City of Chicago, 69 Ill. App.3d 996 (1st Dist. 1979), wherein the document in question specifically provided that the operators were to "advance all .. taxes assessed" and then obtain reimbursement therefor from the City. Rosewell, *supra* 999-1000, 1003.

Here, applicant cannot transfer to the City any of the costs associated with its fulfilling its contractual liability. In this sense, applicant's financial position is no different than that of any other commercial tenant that incurs such liability. Thus, the economic dynamics of this agreement are inconsistent with those found to be indicative of a non-taxable license in Rosewell.

More importantly, relieving this applicant of its otherwise lawful obligation to pay property taxes would provide it with an economic advantage not enjoyed by others who operate in the otherwise competitive retail space at the airport. Specifically, I take administrative notice of the Order in McDonald's Corporation v. Bower, *et al.*, 00 L 50707 (1st Dist., 2002), wherein an agreement that is substantially similar to the one currently at issue was found to create a taxable leasehold in certain food concession operations also located at O'Hare airport.

This Order is does not constitute binding precedent under Supreme Court Rule 23(e).[7] However, public policy dictates that the ultimate results in this case and McDonald's must be uniform. If they are not, then the applicant will be allowed to operate its food concession in direct proximity to, and in express competition with, other similar concessions that vie for customers in a decidedly competitive marketplace. Thus, providing this applicant with what, for all intents and purposes is a property tax exemption, jeopardizes the competitive equilibrium of that marketplace by providing applicant with an economic advantage not enjoyed by competitors that operate otherwise similar concessions. *Accord*, Evangelical Covenant Church of America v. City of Nome, 394 P. 2d 882 (1964) (denying exemption for property used for religious broadcasting on similar grounds, namely that granting such exemption would violate public policy by promoting unfair competition in the otherwise competitive broadcasting industry).

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7. Supreme Court Rule 23(e) states that:

> **Rule 23. Disposition of Cases in the Appellate Court**
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> The decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule. All dispositive opinions and orders shall contain the names of the judges who rendered the opinion or order. Only opinions of the court will be published.
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> **(e) Effect of Orders.** An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.

S. Ct. Rule 23(e).

Based on the foregoing, I conclude that the agreement at issue herein, when viewed in its totality, creates a taxable leasehold interest in the subject leasehold. Therefore, the Department's initial determination in this matter should be affirmed.

WHEREFORE, for all the aforementioned reasons, it is my recommendation that applicant's interest in real estate identified by Cook County Parcel Index Number 12-08-100-006-8561 remain subject to a leasehold assessment for 2001 real estate taxes under Section 9-195 of the Property Tax Code.

Date: 9/22/2004

Alan I. Marcus
Administrative Law Judge